88-1068

No. -

Supreme Court, U.S.
FILED
DEC 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER TERM, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Does the decision below, affirming judgment notwithstanding the verdict on Petitioner's antitrust claim against Respondent Hospital under Sherman Act Section 1, 15 U.S.C. § 1, conflict directly with *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), where the jury found that the Respondent Hospital participated in a contract, combination, or conspiracy in violation of Section 1 and where there was abundant evidence that the Hospital, through its employee nurses and through physicians operating its emergency room under contract with and for the Hospital, had joined with other physicians in the community in agreeing not to refer patients to Petitioner?

2. Does the decision below upholding judgment n.o.v. conflict with *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962), where the jury found that the Hospital had entered into a contract, combination, or conspiracy in violation of Sherman Act Section 1 and where the Hospital had entered into an exclusive contract with a non-cardiologist for the professional interpretation of highly specialized cardiological tests when Petitioner was known to be the only board certified cardiologist on the Hospital's medical staff who was fully qualified by training and experience to interpret such tests?

3. Is Petitioner, an antitrust plaintiff, who successfully proved both the existence of a Sherman Act Section 1 combination and injury to his business or property caused in fact by the actions of the combination, entitled as a matter of law under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), to an award of at least nominal damages and, therefore, a reasonable attorney's fee and expenses incurred in vindicating the antitrust laws?

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1. The parties below were Petitioner Suketu H. Nanavati, M.D. ("Nanavati") and Respondents Burdette Tomlin Memorial Hospital ("Burdette Tomlin," "BTMH," or "the Hospital"), the Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hospital ("the Committee"), and Robert J. Sorensen, M.D. ("Sorensen"). Together with this Petition, Nanavati is filing with the Clerk a notice pursuant to Rule 19.6 of the Court, of his belief that Sorensen has no interest in the outcome of the Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	ix
JURISDICTION OF THE COURT	x
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
1. The Ruling below Conflicts with the Court's Decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, Because the Unlawful Actions of the Hospital's Agents are to be Imputed to their Principal	7
2. The Judgment N.O.V. Upheld below Conflicts with *Continental Ore Co. v. Union Carbide Corp.* and Presents an Issue of Extreme National Importance, Since the Jury Found a Sherman Act Section One Violation, and there was a Patently Unreasonable Exclusive Contract with Potential Adverse Effects on Health Care Quality	11
3. Entitlement, as a Matter of Law, to an Award of at Least Nominal Damages and Attorney's Fees and Costs is an Important Issue of National Antitrust Policy where the Plaintiff has Proved a Violation of the Sherman Act and Causation of Injury	16
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982) ..... i, 7, 8, 10, 15

American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946) 11

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) 20

Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982) 10

Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884 (2nd Cir. 1988) 16

Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976) 19

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) . 17

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 20

Byram Concretanks, Inc. v. Warren Concrete Prod. Co. of N.J., 374 F.2d 649 (3d Cir. 1967) 18

Carey v. Piphus, 435 U.S. 247 (1978) 19, 20

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962) ..... i, 11, 12, 13, 15

General Leaseways v. Nat'l Truck Leasing Ass'n, 830 F.2d 716 (7th Cir. 1987) 18

Henderson v. Kibbe, 431 U.S. 145 (1977) 10

Home Placement Service v. Providence Journal Co., 819 F.2d 1199 (1st Cir. 1987) 19

Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) 13

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) 17

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 15

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Knutson v. Daily Review, Inc., 468 F. Supp. 226 (N.D. Cal. 1979), *aff'd*, 664 F.2d 1120 (9th Cir. 1981) ... 17

Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) 10

Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) 20

Nanavati v. Burdette Tomlin Memorial Hospital, 857 F.2d 96 (3d Cir. 1988) ..... ix, 4, 10, 12, 14, 16, 18

Nanavati v. Burdette Tomlin Memorial Hospital, 645 F. Supp. 1217 (D. N.J. 1986) ..... ix, 3, 14

Nanavati v. Burdette Tomlin Memorial Hospital, 107 N.J. 240, 526 A.2d 697 (1987) 6, 13

Patrick v. Burget, 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988) 12, 14

Patrick v. Burget, 800 F.2d 1498 (9th Cir. 1986), *rev'd* 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988) ... 11

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978) 15, 20

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 15, 20

Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n., 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982) 17, 18

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 17

United States v. Doe, 465 U.S. 605 (1984) 10

U.S. Football League v. National Football League, 842 F.2d 1335 (2nd Cir. 1988) 17, 18

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 17

Other Authorities:

Clayton Act, Section 4(a), 15 U.S.C. § 15(a) .. i, 1, 2, 17, 18

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Clayton Act, Section 16, 15 U.S.C. § 26 19

Sherman Act, Section 1, 15 U.S.C. § 1 ..... i, 2, 7, 11, 16

28 U.S.C. § 1254(1) x

42 U.S.C. § 1983 19

Seventh Amendment to the United States Constitution .. 3

Supreme Court Rule 19.6 i

21 Cong. Rec. 2456 (1890) 20

OPINIONS BELOW

The opinion below of the United States Court of Appeals for the Third Circuit is reported as *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1988). The opinion of the trial court granting the defendants' motion for judgment notwithstanding the verdict as to the antitrust claims and denying Petitioner Nanavati's motion for judgment notwithstanding the verdict on state law defamation claims against him is reported as *Nanavati v. Burdette Tomlin Memorial Hospital*, 645 F. Supp. 1217 (D. N.J. 1986). These opinions, which are reproduced in the Appendix hereto, are cited in this Petition as "857 F.2d at ____" or "645 F. Supp. at ____," as the case may be. (Citation to the Appendix is in the form "A-____," while citation to the Joint Appendix in the United States Court of Appeals for the Third Circuit is in the form "____a.")

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 4, 1988. Petitions for rehearing were denied by that court on September 26, 1988. Jurisdiction of the Court to review said judgment by writ of certiorari is invoked under and conferred by 28 U.S.C. § 1254(1).

No.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves Petitioner Nanavati's antitrust claims under Section 4(a) of the Clayton Act, 15 U.S.C.

§ 15(a), arising from violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Sherman Act Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act Section 4(a) states:

> (a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—
>
> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that

such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings, and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

In addition, because the decision below affirmed the grant of judgment notwithstanding the verdict after the jury found an antitrust violation and awarded Petitioner $350,000 in single antitrust damages, the Seventh Amendment to the United States Constitution is implicated. It provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This Petition follows a jury verdict in favor of Petitioner Nanavati on his antitrust claims against Burdette Tomlin and the Executive Committee of its Medical Staff. In answer to special verdict questions, the jury found that the Hospital and Committee participated in a contract, combination, or conspiracy which was an unreasonable restraint of trade. 645 F. Supp. at 1237-39. The jury awarded Nanavati single damages in the amount of $350,000. *Id.*, at 1239. Judgment in the trebled amount of $1,050,000 was entered on July 23, 1986.

On October 2, 1986, the trial court, the United States District Court for the District of New Jersey, granted the motion of the Hospital and Committee for judgment notwithstanding the verdict. 645 F. Supp. 1217ff. The United States

Court of Appeals for the Third Circuit affirmed. 857 F.2d 96ff.[2] The facts out of which this litigation arose are briefly as follows.

Dr. Nanavati is a physician who is board-certified as an internist and as a cardiologist. In order to be eligible for board certification in the subspecialty of cardiology, a physician must first be board certified in the specialty of internal medicine. 4082a. The physician must also be trained in a post-residency fellowship specifically in cardiology for a period of two years.

Since 1979, Nanavati has engaged in the private practice of medicine in Cape May County, New Jersey (the "County") and receives compensation on a fee-for-service basis. Burdette Tomlin is the only hospital in the County.[3] Nanavati was admitted to the Staff of BTMH in the spring of 1979. He was the first board-certified cardiologist on the Staff.

Sorensen has been, at all relevant times, a physician on the BTMH Staff, Chief of Cardiology, a member of the BTMH Board of Governors, and a Vice President of BTMH. 4055a. During the period in issue, he became Chief of Medicine as well. Sorensen has also been, at all relevant times, a physician in private practice in the County who provides medical care to patients on a fee-for-service basis. He has held himself out to the medical profession and public in the County as a cardiologist, although he has not been certified as such by the appropriate medical subspecialty board and is not even eligible by training to become board certified. 5104a.

The Staff of BTMH is composed of all physicians who are entitled to practice medicine at BTMH. The Staff is governed by a set of Bylaws which determines the Staff's structure and certain relationships between the Staff and its members and

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2. The Third Circuit also reversed a judgment against Petitioner Nanavati and in favor of Sorensen and the Hospital on their claims for slander and tortious interference with business relations under New Jersey law. None of those claims is presented here.

3. Cape May County is geographically isolated. It is bounded by water on three sides: by the Atlantic Ocean to the east and south and by Delaware Bay to the west.

among those members. 3005a. The Staff's Executive Committee is the governing body of the Staff, and the members of the Committee are elected by the Staff membership. 3050a-3052a.

The Board of Governors is the governing body of BTMH. It approves the Staff Bylaws. 3067a.

Over his first few years at Burdette Tomlin, Nanavati developed a growing cardiology practice. But he also became aware of instances of improper professional readings and interpretations by Sorensen of electrocardiograms ("EKG's") on his, Nanavati's patients.[4] In these instances, Nanavati would bring the matter to the Committee's attention. Nanavati's letter dated January 22, 1981, is an example of an attempt to bring to the Hospital's attention Nanavati's concerns about Sorensen's failures on occasions to read EKG's correctly. 2297-1a. The letter, expressing concern for the possibility of needless loss of life, was sent only to those with a need to know and an ability to take corrective action. These included certain Staff officers, the Hospital's top administrator, and the chairman of its board of governors, as well as Sorensen. *Id.*

The Staff rejected Nanavati's charges allegedly in reliance upon the opinion of an outside expert. Instead, the Chairman of the Committee, Dr. Alameno, testified that at a gathering at his home on August 2, 1982, the Committee decided—without any charges having been brought against Nanavati—that he would be removed from the Staff. 5128a. Alameno also admitted that, even before this meeting, the decision to oust Nanavati had been approved separately by the Staff's attorney and by the Hospital's attorney, Mr. Valore. 5125a.

When charges were ultimately lodged against Nanavati for the purpose of ousting him, he was repeatedly denied

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4. The Hospital reader provides the official professional interpretation of the EKG's done in BTMH. The patient pays for this "service" in addition to what the actually attending physician charges for his or her own reading of the same EKG.

important rights under the Staff's Bylaws. As a result, Nanavati was summarily expelled from the Staff in November, 1982. He turned to the New Jersey courts and obtained injunctive relief reinstating him. After numerous orders and purported Hospital "hearings," the New Jersey Superior Court, Chancery Division made its injunction permanent.

The state court ruled that Nanavati's various "hearings" at BTMH were a nullity because his case was pre-determined and the proceedings were tainted with that prejudgment. This ruling was upheld by the Appellate Division of the Superior Court of New Jersey, 2481a, and then by the Supreme Court of New Jersey.[5] *Nanavati v. Burdette Tomlin Memorial Hospital*, 107 N.J. 240, 526 A.2d 697 (1987). The trial court below accorded that decision collateral estoppel effect, and so informed the jury. 215a; 5000a.

After the attempt summarily to oust Nanavati from the Staff, Nanavati began to suffer the effects of a boycott. Referrals of patients from the Emergency Room ("ER") dried up, and other physicians for the most part stopped sending him patients for either consultations or referrals.[6] 6007a; 6008a. Even shortly before trial, ER personnel were not notifying Nanavati when his own patients would come in and ask for him. 5097a-5103a.

When state court intervention derailed the attempts to remove Nanavati, the Hospital in early 1983 sought out Dr. Henry Komansky, a pulmonologist, for the purpose of having

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5. While the Appellate Division and the Supreme Court affirmed the Chancery Division's findings, they vacated the portion of the injunction which precluded a new, untainted set of hearings at the Hospital. Finally, however, the Hospital abandoned all charges. A consensual permanent injunction was entered on November 15, 1988. See Appendix at A-107.

6. A consultation occurs when an attending physician seeks and obtains for his or her patient the specialty advice or care of another physician, while the physician seeking the consultation continues as the principal doctor for the patient's care. A referral occurs when a doctor sends her or his patient to another specialist for complete care and treatment of a specific condition within the specialist's field of expertise. After the referral, the patient may or may not return to the original physician for care in other matters.

his group provide exclusively certain cardiological specialty services. 4264a. These included particularly the interpretation of echocardiogram tests, highly sophisticated ultra-sound techniques for watching the inside of the patient's heart while it beats. At that time, although Nanavati was qualified to provide such specialized interpretive services, Komansky was not, and Sorensen did not. 4058a; 6002a; 6009a.

The effect of this contract was that, when Nanavati wanted echocardiograms performed on his hospitalized patients, they were charged for an official Hospital interpretation which their chosen doctor was not allowed to perform.

Also, in 1983, as part of its repeatedly unlawful proceedings in trying to exclude Nanavati from the Staff and otherwise to discredit him in the eyes of fellow physicians and the public, the Hospital's Board of Governors Hearing Committee formulated a lengthy report. Whereas Nanavati's criticisms of Sorensen had been lodged internally, BTMH published this report. It was furnished to the members of the press for inspection at the Hospital (4295a), and a copy of it was made available in the local public library (5095a). To assure even broader dissemination of the hearing committee's report and recommendation that Nanavati be removed from the Staff, and in furtherance of its plan to discredit Nanavati publicly, Burdette Tomlin actually held a press conference on the subject. 4295a.

REASONS FOR GRANTING THE WRIT

1. The Ruling below Conflicts with the Court's Decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, Because the Unlawful Actions of the Hospital's Agents are to be Imputed to their Principal.

The jury in this case found unequivocally that the Hospital and Committee were parties to a contract, combination, or conspiracy in violation of Section One of the Sherman Act. The jury found that there was a group boycott and awarded Petitioner Nanavati $350,000 in single damages as a result.

Nevertheless and despite the deference the Seventh Amendment commands should be accorded a jury's verdict, the district court granted judgment n.o.v. in favor of the Hospital and Committee. The Third Circuit affirmed.

In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court held that a nonprofit organization could be held "civil[ly] liab[le]" under the antitrust laws for acts of its agents performed with apparent authority. *Id.* at 559. This imputed liability is appropriate, the Court explained, because the corporation's agents "are able to affect the lives of large numbers of people" as well as "the competitive fortunes of businesses" in the area. *Id.* at 577. They achieve this ability in no small part because, as in this case, the corporation "cloaks its [agents] with the authority of its reputation." *Id.*, at 571. Thus, "when the great influence of [the corporation]'s reputation is placed at their disposal, the less altruistic of [the corporation]'s agents have an opportunity to harm" individual competitors. *Id.*

The Third Circuit, in discussing Nanavati's group boycott claim, never analyzed the relevant evidence under the *Mechanical Engineers* standard, which is sufficient to uphold the Hospital's liability. For example, the evidence showed that Hospital nurses in the Emergency Room failed to notify Nanavati even when his own patients arrived there and requested his services. 5098a-5103a. The evidence showed that, on at least one such occasion, Nanavati was actually physically in the Hospital at that time. *Id.* On another occasion, one of Nanavati's patients was told by emergency room nurses employed by the Hospital that Nanavati could not admit the patient because Nanavati was behind in his paperwork,[7] yet the president of the Hospital was later forced to admit, after checking the Hospital records, that no such "records" suspension had been imposed on Nanavati at that time. A-109.

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7. When a physician is behind in his or her obligation to complete the charts of patients who have been in the hospital, the physician's privilege to admit additional patients may be suspended until the backlog is cleared. This temporary measure is frequently referred to as a "records suspension."

Other evidence, which the court of appeals failed to view in the light most favorable to Nanavati, showed widespread agreement among other doctors practicing at the Hospital (who were *not* Hospital agents) that "the Indian doctors are overrunning us and we have to stop it" (4071a) and that "we have to fight" foreign doctors coming into the area by "bring[ing] in an American cardiologist" after getting rid of Nanavati.[8] 4335a-36a. Moreover, certain staff physicians agreed to limit referrals by Indian doctors of patients from the Hospital's emergency room to the intensive care unit. 4073a. And one ER physician, who was a member of the medical staff under a contract to operate the ER for the Hospital, testified that he was told by another doctor, after referring a patient to Nanavati, that he should keep these referrals "in the family." He understood this meant not to refer patients to Nanavati. A-110. Another ER physician testified that, as a result of instructions from the director of the ER, he decreased the number of patients he referred to Nanavati. A-112. Moreover, he testified that

> there were nurses that felt the same way I did, that the care by Dr. Nanavati was such that should be given to the patients; and if the nurses were caught suggesting that he was a better doctor, just as I was, that they were in jeopardy of losing their job.

A-115. As a result of these conditions, this ER physician ultimately decided to leave Burdette Tomlin. As he put it, "When I had to stop suggesting who I felt was the best cardiologist, then I felt ... that the quality was down, was poor." A-114.

Clearly, taken as a whole, this is sufficient evidence to impute to the Hospital the conduct of its agents. The jury was entitled to conclude that the drop in referrals to Nanavati was the result of concerted conduct by physicians in the community, and nurses and doctors in the Hospital's emergency

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8. In fact, Nanavati was a naturalized United States citizen born in India.

room. Particularly is this so in light of the efforts by Burdette Tomlin to discredit Nanavati in the eyes of the County's medical community and the public generally.

The Third Circuit failed to apply the agency doctrine of *Mechanical Engineers* to the conduct of the emergency room personnel. The court acknowledged that individual staff doctors (who were not agents of the Hospital) interacted in the ER. 857 F.2d 118. But the court failed to recognize that, because other physicians and nurses employed by the Hospital were part of the conspiracy with those independent physicians, the conspiratorial conduct of the Hospital's agents is imputed to the Hospital.

Where the decision of a court of appeals fails to apply, misconstrues, or misconceives the law announced by this Court in its opinions, the Court will grant the writ of certiorari in order to review the court of appeals decision. See, *e.g.*, *United States v. Doe*, 465 U.S. 605, 610 (1984); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982); *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977).

This case also presents an issue of national importance in the increasingly competitive health care environment. Will the Court reinstate a jury's verdict for an individual physician harmed by a boycott in which the only hospital in the county actively participated? As the Court has explained in *Mechanical Engineers*, "if . . . [the Hospital] is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future." 456 U.S. at 572. On the other hand, if the writ is not granted in this case, an appellate decision in conflict with *Mechanical Engineers* will encourage conduct which is not only anticompetitive but also contrary to the best interests of patients throughout the country. Left standing, the decision below will encourage hospitals to permit their employees and agents to threaten and coerce physicians, nurses, and patients into not recommending or obtaining the

best treatment available.[9] It will also discourage health care professionals from reporting substandard—and, perhaps, life threatening—medical practices. Particularly in health care, then, our national commitment to competition unfettered by unreasonable restraints has particular importance, because it can assure the availability to the public of the highest level of patient care.

2. The Judgment N.O.V. Upheld below Conflicts with *Continental Ore Co. v. Union Carbide Corp.* and Presents an Issue of Extreme National Importance, Since the Jury Found a Sherman Act Section One Violation, and there was a Patently Unreasonable Exclusive Contract with Potential Adverse Effects on Health Care Quality.

In *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962), the Court expressly held that antitrust plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Justice White wrote for the Court, *id.*, quoting *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946):

> . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.

There, the Court reversed the judgment of the court of appeals which had affirmed a jury verdict against the antitrust plaintiff.

In evaluating the record in this case, the Third Circuit

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9. *Cf.*, *Patrick v. Burget*, 800 F.2d 1498, 1509 (9th Cir. 1986), *rev'd*, 486 U.S. —, 100 L.Ed. 2d 83, 108 S.Ct. 1658 (1988) (The conduct of the physician competitors was "shabby, unprincipled and unprofessional.").

failed to apply the approach clearly enunciated in *Continental Ore* and violated the principle of taking the evidence as a whole—and in the light most favorable to the antitrust plaintiff who prevailed at trial.[10] Worse yet, the court mischaracterized the claims in the record. By holding that there was no evidence[11] from which the jury could have inferred that the Hospital was part of a contract, combination, or conspiracy, the court of appeals failed to consider the evidence of: (1) a group boycott by physicians at the Hospital, (2) the Hospital's participation in this boycott by, *inter alia*, entering into a patently unreasonable exclusive contract, and (3) the exclusive contract as an unreasonable contract itself.

The evidence of Hospital involvement in a contract, combination, or conspiracy is manifest in the record. First of all, the evidence showed that the Hospital sought out Komansky, a pulmonary physician, with whom it contracted for the exclusive provision of in-hospital stress tests and echocardiograms. Yet Komansky was not qualified to provide professional interpretation of the echocardiograms, which are highly sophisticated cardiological tests that Nanavati was the only physician at the Hospital qualified and willing to interpret. Moreover, Komansky charged $200 for interpretation of echocardiograms, although Nanavati had offered to perform his more qualified service for $100. 4266a; 3132a. Thus, the jury knew that the Hospital was providing inferior service at an inflated monopoly price. Therefore, when the jury found there was a contract, combination, or conspiracy in restraint of trade, the jury could have concluded in this record that the Hospital-Komansky exclusive contract was just such a contract.

Further, as a matter of collateral estoppel arising from the

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10. *Patrick v. Burget*, 486 U.S. —, —n. 3, 100 L.Ed.2d 83, 90 n. 3, 108 S.Ct. 1658, 1661 n. 3 (1988).

11. Without explanation, 857 F.2d at 110 n. 14, the court below affirmed the exclusion of proffered evidence that an emergency room physician was told by the director of the Hospital's ER that the doctor was referring too many patients to Nanavati and that the ER director had discussed this with Sorensen.

prior state court litigation,[12] it was *stipulated by the parties* (and the jury was so instructed) that the decision of the Hospital's Board of Governors

> to terminate Dr. Nanavati's staff privileges was not the result of a deliberative process. There never was an attempt to reach an intelligent and reasonable judgment in good faith upon all the facts presented. Instead, the action of the Board in revoking Dr. Nanavati's privileges was a nullity from the beginning to the end. It was based on a prior disposition or a pre-judgment to remove Dr. Nanavati from the Medical Staff. His termination was a foregone conclusion once the charges were brought against him. As such, the Board of Governors abandoned its responsibility as a fiduciary.

5000a-01a. From this stipulation alone, the jury could have inferred that the Hospital had, in entering into the exclusive Komansky contract, acted intentionally to foreclose Nanavati from the opportunity to provide highly skilled medical interpretations of the echocardiogram tests performed at the Hospital. Thus, in its quest to injure Nanavati, the Hospital was willing to abandon its fiduciary duty to its patients to secure the best possible medical care for them.[13]

In addition, the jury could have determined from the conclusively found bad faith of the Hospital that it acted in furtherance of unlawful conduct of others. After all, conspiratorial conduct is rarely proved by direct evidence. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223-28 (1939). Since there was no legitimate explanation for the Hospital's conduct, the jury obviously could conclude—particularly in light of the admonition in *Continental Ore* that an

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12. The state court findings in this regard were upheld by the Supreme Court of New Jersey. *Nanavati v. Burdette Tomlin Memorial Hospital*, 107 N.J. 240, 526 A.2d 697 (1987).

13. While Nanavati was clearly an injured target of the Hospital's exclusive contract, the provision of quality health care to the consuming public—the Hospital's patients—was also sacrificed by the Hospital through the unreasonable contract.

antitrust plaintiff's evidence not be compartmentalized—that the Hospital was attempting to join in and enhance the effects of the physicians' boycott by a total exclusion of Nanavati from the only hospital facilities in the isolated County. The Court has recent experience with such attempts by hospitals and physicians. *See Patrick v. Burget*, 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988).

The Third Circuit nevertheless reached the opposite conclusion by misstating that "Nanavati does not maintain that the Hospital took official action in furtherance of the boycott." 857 F.2d at 119-120. Moreover, the court stated, *id.*, at 120 n. 23:

> Nanavati also maintains that an exclusive contract with Dr. Henry Komansky for the provision of stress and echocardiogram tests is sufficient to implicate the Hospital in a conspiracy to exclude him, but Nanavati does not indicate how the Komansky contract would demonstrate the Hospital's involvement in either of the two anticompetitive acts sought to be proved at trial—the staff privileges revocation or the boycott of referrals.

These statements are contradicted by the record, as the preceding discussion establishes. Further, Nanavati *did* argue that the exclusive Komansky contract initiated by the Hospital could be viewed by the jury, not only as evidence of the Hospital's involvement in the boycott of Nanavati but also as a separate contract in restraint of trade. Contrary to the appellate decision below, the district court itself understood Nanavati to be asserting that the Komansky contract was a contract in unreasonable restraint of trade and addressed it as such. 645 F. Supp. at 1233. Indeed, the district court acknowledged (*id.*, italics supplied) that

> Nanavati *relies heavily*, in support of his argument that liability under the antitrust laws can properly be imposed against the Hospital in this case, on the fact that the Hospital contracted with a pulmonary specialist, Dr.

> Henry J. Komansky, for the exclusive official reading and interpretation of stress tests and echocardiograms.

The Court has frequently recognized that "a principal purpose of the antitrust private cause of action ... is, of course, to deter anticompetitive practices." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982). *See also Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314 (1978); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-344 (1979). In light of that central purpose, it is important for the Court to grant this Petition in order to uphold a jury verdict of antitrust violation arising out of an exclusive services contract in the circumstances here.

Particularly is this so in light of the holding in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). There the Court rejected a claim that an exclusive anesthesiology contract constituted an unlawful tying of that service to the service for surgery at the hospital. The Court was careful to note, however, that the contract could have been unlawful in other circumstances. In footnote 51 to its opinion, the Court observed (*id.* at 30; italics supplied):

> Like any exclusive-requirements contract, this contract *could be unlawful* if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services.

This Petition presents, therefore, not only a failure by the court below to adhere to the dictates of *Continental Ore*, but as well the important question of federal law whether, in the facts of this case, the exclusive contract and other conduct of the Hospital were, as the jury determined, a violation of Sherman Act Section 1. The legality of the exclusive contract here is an important public matter of national significance, which goes well beyond the interests of the parties in this case. As explained, the Hospital sacrificed quality health care

to isolate a qualified physician from patients. Health care services throughout the nation are threatened if that kind of conduct is not reviewed and held unlawful.

3. Entitlement, as a Matter of Law, to an Award of at Least Nominal Damages and Attorney's Fees and Costs is an Important Issue of National Antitrust Policy where the Plaintiff has Proved a Violation of the Sherman Act and Causation of Injury.

As previously noted, the record in this matter is replete with evidence that numerous entities (including the Hospital and individual physicians) acted with the Executive Committee to harm Nanavati in violation of Section 1. The jury, upon consideration of this evidence found, *inter alia*, that the Executive Committee was a combination in unreasonable restraint on interstate commerce, thereby injuring Nanavati in his business or property. 857 F.2d at 115-16. Based upon these findings the jury awarded Nanavati single damages of $350,000.

In affirming the district court's entry of judgment n.o.v. on petitioner's antitrust claims, the court of appeals concluded that there was an unlawful combination, but Nanavati had failed to prove any damages flowing from the five day revocation of his staff privileges by the Executive Committee. *Id.*, at 121-22. The court based this conclusion upon its findings of no "quantified" evidence of economic loss suffered by Nanavati during this period and no evidence of long term damages resulting from the revocation. *Id.*, at 122. In so ruling, the court either ignored or misapprehended the factual record which established that Nanavati sustained significant damages, including lost revenue and the expenditure of legal fees, as a result of the improper revocation. See A-111, A-116, A-117. The jury's findings on this issue were clear and unambiguous and, consistent with Nanavati's rights under the Seventh Amendment, entitled to proper deference. *See Aurwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-91 (2nd Cir. 1988).

By failing to give due consideration to the evidence of damages sustained by petitioner and proper deference to the jury's findings based upon this evidence, the court below erred in its determination to affirm the district court's entry of judgment n.o.v. on Nanavati's antitrust claim.

Moreover, in reaching its conclusion the court apparently failed to consider the well-established distinction between an antitrust plaintiff's burden of proving the *fact* that he suffered injury, and the *amount* of damage sustained. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). "[Plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio*, 395 U.S. at 114 n.9 (italics in original). Given the difficulty of ascertaining what a "plaintiff's situation would have been in the absence of the defendant's antitrust violation," *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981), this Court has held that exact proof of the amount of damages is not required. *Id.* Rather, an antitrust plaintiff must only provide evidence sufficient to support a "just and reasonable estimate" of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

Accordingly, petitioner submits that even if his damages were not sufficiently "quantified," in view of the jury's determination that he was injured by defendants' violation of the antitrust laws, he is entitled—at a minimum—to an award of nominal damages.

Awards of nominal damages in antitrust actions have been routinely approved by federal courts. *See e.g., U.S. Football League v. National Football League*, 842 F.2d 1335, 1377 (2nd Cir. 1988); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n.*, 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Knutson v. Daily Review, Inc.*, 468 F. Supp. 226 (N.D. Cal. 1979), *aff'd*, 664 F.2d 1120 (9th Cir. 1981). Ordinarily, a finding of the fact of damage caused by a violation of the antitrust laws "necessitates an assess-

ment of some amount of damages." *General Leaseways v. Nat'l Truck Leasing Ass'n*, 830 F.2d 716, 729 (7th Cir. 1987). Where a plaintiff proves that he has been injured but fails to satisfy his burden of proving the amount of damage sustained (which is apparently the basis of the court's decision below), nominal damages should be awarded. *See U.S. Football League v. National Football League*, 842 F.2d at 1377 (award of nominal damages appropriate after fact of damage was found but jury was unable to distinguish amount of losses caused by defendant's misconduct from amount caused by other factors); *Rosebrough Monument*, 666 F.2d at 1146-47 (finding as to fact of damage caused by tying arrangement reversed and case remanded to district court with directions to award plaintiff nominal damages in amount of $3). *Cf. General Leaseways*, 830 F.2d at 729 (affirmative defense of equal fault could preclude any monetary recovery despite proof of injury).

The issue of Nanavati's entitlement to an award of nominal damages is one of great import. Even though the court below agreed that he proved an antitrust combination existed[14] and even though he presented unequivocal evidence of harm resulting to him,[15] at the present time, no independent statutory basis for an award of attorney's fees exists, contrary to the dictates of Congress. Section 4 of the Clayton Act provides that a person injured as a result of conduct forbidden by the antitrust laws "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. Because recovery of treble damages is a prerequisite to an award of attorney's fees under Section 4, *Byram Concretanks, Inc. v. Warren Concrete Prod.*

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14. The Third Circuit found "that the Executive Committee is . . . a combination, at least with regard to the revocation of Nanavati's staff privileges." 857 F.2d at 118.

15. The evidence showed that Nanavati, as a result of the combination, was precluded from reading electrocardiograms on at least one day, where he normally read 25-30 EKG's per day and earned $5 apiece for such readings (A-109), and that he limited the impact of the combination only through the expensive resort to the state court which entered an injunction now made permanent. A-107, A-111, A-116.

Co. of N.J., 374 F.2d 649, 651 (3d Cir. 1967), Nanavati is precluded from receiving attorney's fees pursuant to this provision. Additionally, since injunctive relief in this action presently appears to be moot,[16] there is similarly no basis for an award of attorney's fees under Section 16 of the Clayton Act, 15 U.S.C. § 26.

While the recovery of only nominal damages may be considered as a factor in determining the amount of attorney's fees to be awarded, *Home Placement Service v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987), once treble damages are recovered by an antitrust plaintiff, the award of reasonable attorney's fees is mandatory. *See Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976).

The precise issue of an antitrust plaintiff's entitlement to recovery of nominal damages, and hence of attorney's fees, has not been addressed or decided by this Court. However, in other contexts the Court has indicated that an award of at least a nominal sum is appropriate. For example, in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), an action seeking damages under Section 1983 of the Civil Rights Acts, 42 U.S.C. 1983, the Court held that a denial of procedural due process should be actionable for nominal damages without proof of actual injury. In reaching this conclusion, the Court considered: the nature of this right, noting that it is "absolute"; the "importance to organized society" that it be observed; and the purpose of Section 1983, the statutory provision under which plaintiffs sought to vindicate this right. With respect to the latter consideration, the Court, after initially finding that "the basic purpose" of § 1983 damages is "to compensate persons for injuries that are caused by the deprivation of constitutional rights," *id.*, at 254, nevertheless went on to recognize:

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16. Because an order permanently enjoining Nanavati's dismissal was finally entered in the prior state court proceedings, A-107, and because of the limited nature of the antitrust violation found by the court below, it seems impractical for him to seek injunctive relief in the present action.

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

Id., at 258-59. *See also Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

Applying this analysis to the antitrust context leads inexorably to the conclusion that an award of nominal damages should be permitted where a plaintiff has proved the fact but not the amount of damage sustained; moreover, such an award should support the recovery of attorney's fees.

The Court has acknowledged that the Sherman Act, although obviously not afforded explicit constitutional protection, is a "charter of freedom" which "has a generality and adaptability comparable to that found in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). Congress intended that the antitrust laws be given broad, remedial effect. *See Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312-13 (1978). In establishing a private right of action against antitrust violations, Congress sought to deter anticompetitive practices. *Id.*, at 314. To this end it permitted the recovery of treble damages in actions brought under Section 4. "Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (italics in original). Moreover, the Court has noted that treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977), quoting 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman).

Given the fundamental nature of the rights granted by the antitrust laws, the difficulty and expense inherent in the prosecution of actions seeking redress for antitrust violations, and the pivotal role that awards of reasonable attorney's fees play in enabling parties to vindicate these important rights, a clear pronouncement on this issue—by this Court—is sorely needed.

CONCLUSION

For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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